4-586

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 204.

EDGAR G. MACLAY, CHARLES A. BROADWATER, GEORGE STEELE, AND MATHEW CARROLL, PLAINTIFFS IN ERROR,

vs.

ABRAHAM SANDS AND JULIUS SANDS.

PHILADELPHIA BAR ASSOCIATION

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

FILED OCTOBER 21, 1874.

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IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA

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1 In the district court, 3d judicial district, Lewis & Clarke County, Montana Territory.

ABRAHAM SANDS & JULIUS SANDS
vs.
EDGAR G. MACLAY, CHAS. A. BROADWATER, Geo. Steele, and Mathew Carroll.

Be it remembered that among the proceedings, records, and pleadings had, made, and filed in the above-entitled cause in said district court, are the following, to wit:

On the 18th day of October, A. D. 1872, the plaintiffs filed in said court their complaint, which is in words and figures following, to wit:

In third judicial district court, Lewis & Clarke County, Montana Territory.

ABRAHAM SANDS & JULIUS SANDS
vs.
EDGAR G. MACLAY, C. A. BROADWATER, George Steele, & Mathew Carroll.

The plaintiffs in this cause, who are partners in business in
2 the town of Helena, in said county, doing business under the firm-name of Sands Bros., by Chumasero & Chadwick, their attorneys, complain against the defendants, who are partners in said Helena, under the name, firm, and style of E. G. Maclay and Company, that at the times hereinafter mentioned the defendants were common carriers, and jointly interested in receiving and carrying goods for hire between the places hereinafter mentioned; that on or about the fifth day of August, A. D. 1872, at Corrine, in the Territory of Utah, the said plaintiffs caused to be delivered to said defendants, and said defendants, as such carriers, received certain goods, the property of the plaintiffs, to wit, certain cases and bales of goods, which are described in the schedule hereto annexed, and marked "A," and which is made a part of this complaint, of the value of two thousand and seven hundred and four dollars & sixty-one cents, to be by the defendants safely carried to Helena, in the Territory of Montana, and there delivered to the plaintiffs for a reasonable reward to be paid by them therefor.

That the defendants did not safely carry and deliver said goods,
3 but, on the contrary, so negligently conducted and so misbehaved in regard to the same, in their said calling as carriers, that the same were wholly lost to the plaintiffs, to their damage two thousand seven hundred and four dollars and sixty-one cents.

Wherefore the plaintiffs demand judgment against the defendants for the said sum of two thousand seven hundred and four dollars and sixty-one cents, with interest from the fifth day of August, A. D. 1872, besides costs.

CHUMASERO & CHADWICK,
Plaintiffs' Attys.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

A. Sands, being duly sworn, says he is one of the plaintiffs above named; that he has heard the same read and knows the contents, and that the facts therein stated of his own knowledge are true.

ABRAHAM SANDS.

Subscribed & sworn to before me this 16th day of October, 1872.
WM. CHUMASERO,
Notary Public.

4 A.—*Referred to and made part of complaint.*

Case ♯697:

10 doz. hmd. lawn hdkfs., 91 c	$9 10
1 ps. French merino, $37\frac{3}{10}$, 117	43 64
3 blk. shawls, 3.57^2	10 72
1 case strapping, &c	2 65
6 drab & gray sacques, 2.92^2	17 55
6 blue, scarlet, & purple sacques, 3.25	19 25
12 doz. 18 x 36 check towel, 2.92^2	35 10
2 ps. bond gingham, 41^1, $41^2 = 82\frac{3}{4}$, 31	25 86
1 gros' hair-pins, 20.47-100, 13.65 50	34 12
18 ps. crass ribbon, 2.60	46 80
6 lbs. Herbert's thread, 2.87-1,722	
6 " Wht'y & Brn., 2.50-50, 2.15-40 = 27.90—45.12, less 20%, 9.02	36 10
$2\frac{7}{8}$ fine Domet	35 10
36 doz. S. I. twist, 1.62^2	58 50
3 " A. B. corsets, 9.10	27 30
25 M. Baylis needles, 1.69	42 25
$15\frac{1}{2}$ doz. socks, 1.95	30 82
8 lbs. white linen thread, $2.53^2 = 20.28$, less 20%, 4.05	16 25
	$491 09

Bale ♯694:

5 Ellerton U. bro. canton, 44, 41^2, 42^1, 38^2, $38^2 = 199^3$, 33	65 92
6 " P. " " 41^3, 41^2, 41^1, 41^1, 41^1, $41^1 = 249^2$, 23^1	58 00
Bale	25
	124 17

B.

Case ♯723:

8 doz. Helena corsets, 14.95	119 60
2 " Adelain " 17.55	35 10
	154 70
5 Less ex. on corsets	50
	154 20
Straps	25
	154 45

B.

Cases ♯709 & 710:

10 ps. satin twill, 53^3, 53^2, 52^1, 52^2, 52^2, 52^2, 51^1, 51^1, 52, $53^1 = 524^1$, 59^3	313 33
10 " grey " 58^2, 58, 57, 59, 59^2, 59^1, 58^2, 59, $58^3 = 586^3$, 59^3	350 59
Cooperage	50
	$664 42

Cases ♯724, ♯725, ♯726:

1 c. Blackstone, AA, S. T., bleached, 1651 @ 19^2	321 94	
Less, 5 %	16 09	
		$305 85
1 c. Hill 4-4 blch'd, 1323 @ 20^3	274 53	
Less 6 %	17 79	
		256 74
2 straps		50
1 c boot E, 1328 @ 16^1		215 80
Strap		25
		$779 14

C.

Cases #718 & 721:	
48 men's last, M. S. Pal., 234	112 32
719 & 721, 48 men's last, M. S. Pal., 280	134 40
#720, 36 " calf " 325	117 00
#721, 24 " " " " 286	68 64
#722, 48 ch. gt. M. W., " 150	72 00
#723, 60 " kid, R. R. Butt, 110	66 00
#722, 48 misses' P. gt, M. S. Pal., 208	99 84
6 cooperage, 18c, 113, & cartage, 50c	1 63
	$671 83

RECAPITULATION.

Amounts on Schedule A	491 09
" " " "	124 17
" " " B	154 45
6 Amount on Schedule B	664 42
" " " "	779 14
" " " "	671 83
	$2,885 10

CR.

By freight from New York to Corinne, 2,279 lbs., @ 2.92 per C	66 54
Corinne to Helena, 2,279 lbs, @ 5 per lb	113 95
	$180 49
Total amount	$2,704 61

On the 12th day of November, A. D. 1872, the defendants filed herein their amended answer; which is in words and figures following, to wit:

Amended answer.

THE TERRITORY OF MONTANA,
Lewis & Clarke County:

3rd jud. dist. court.

ABRAHAM SANDS ET AL.
vs.
EDGAR G. MACLAY ET AL.

The defendants, Edgar G. Maclay, Mathew Carroll, Charles A. Broadwater, and George Steele, for an amended answer to the complaint of Abraham Sands and Julius Sands, plaintiffs, upon their information and belief, deny that in or about the goods in said complaint mentioned, or any thereof, these defendants were common carriers, or jointly or
7 otherwise interested in carrying the same; and upon their said information and belief, the said defendants do deny that on the fifth day of August, A. D. 1872, or at any other time, the plaintiffs aforesaid caused to be delivered to these defendants in their capacity of common carriers, or that these defendants in their said capacity of common or other carriers received, the goods in said complaint mentioned, or any thereof, and deny that they or any of them negligently conducted or misbehaved in regard to the said goods or any thereof, in their said calling as carriers or otherwise. And the said defendants do, upon their information and belief, further deny that said goods or any thereof were

delivered by plaintiffs to these defendants, or received by these defendants or any of them, from plaintiffs, to be by the said defendants carried to Helena or elsewhere, and there or otherwhere delivered to the plaintiffs for a reasonable reward to be paid them therefor, or otherwise. And upon their said information and belief, the said defendants deny that by reason of any neglect or misbehaviour with reference to said goods, the same or any thereof were lost to plaintiffs. And the said defendants have not and cannot obtain sufficient information upon which
8 to base a belief as to whether said goods or any thereof are or were lost to the plaintiffs, and they do therefore deny the same. And the said defendants do further deny, upon their information and belief, that by reason of anything in the plaintiffs' said complaint contained, said plaintiffs have been damaged in any sum of money whatever, and they pray judgment for their costs in this behalf expended.

E. W. TOOLE & W. F. SANDERS,
Attorneys for Defendants.

Edgar G. Maclay, one of the defendants, and jointly interested with his co-defendants in the foregoing action, on his corporal oath doth say that the facts stated in the foregoing amended answer are true of affiant's own knowledge, except the matters therein stated on information and belief, and as to those matters he believes it to be true. Affiant further says that the defendants' said business at Corinne, Utah, was performed by agents, from whom affiant's information upon which he bases said belief is derived. Affiant further saith that no one of the defendants now within this county is acquainted with the facts in said answer set forth; and further affiant saith not.

E. G. MACLAY.

9 Subscribed & sworn to before me this 12th day of November, 1872.

HARRY R. COMLEY,
Notary Public.

On the 12th day of November, A. D. 1872, the plaintiffs filed herein their motion for judgment; which is in words and figures following, to wit:

In the district court, third judicial district, Lewis & Clarke County, Montana Territory.

ABRAM SANDS ET AL.
vs.
EDGAR G. MACLAY ET AL.

And now comes the above-named plaintiffs and move the court to enter judgment in the said action, and for an assessment of damages herein, upon the following grounds, to wit:

1st. That the amended answer filed herein is sham & irrelevant.

2nd. That the denials & matters contained in the said amended answer raise no issue & constitute no defence to the said action.

3rd. That the said amended answer is the same in substance as the answer heretofore filed in the said action.

CHUMASERO & CHADWICK,
Plffs.' Attny.

10 On the 25th day of November, A. D. 1872, the cause came on to be heard upon the plaintiffs' motion for judgment, and the court rendered judgment thereon; which is in words and figures following, to wit:

In 3d judicial district court, Lewis and Clarke County, Montana Territory.

ABRAHAM SANDS & JULIUS SANDS
vs.
EDGAR G. MACLAY, C. A. BROADWATER, MATHEW Carroll, & George Steele. } October term, 1872.

This cause came on for hearing on the 25th day of November, A. D. 1872, on the plaintiffs' motion for judgment on the complaint and the answer of defendants, and was heard before the court. Whereupon same was submitted to the court for consideration and decision, and after due deliberation thereon the court delivered its decision, that the answer of defendants was insufficient, and that the same presented no issue to be tried, and that the denials therein contained were defective and evasive and insufficient, and ordered judgment to be entered upon the said complaint and answer in favor of the plaintiffs and
11 against the defendants for the sum of two thousand seven hundred and four dollars and sixty-one cents, besides costs.

Wherefore, by reason of the law and the decision aforesaid, it is ordered and adjudged that the said plaintiffs do have and recover of and from the said defendants the sum of two thousand seven hundred and four dollars and sixty-one cents, with interest thereon at the rate of ten per cent. per annum from the date hereof until paid, together with the said plaintiffs' said costs and disbursements incurred in this action, amounting to the sum of twenty-six & $\frac{20}{100}$ dollars.

Judgment rendered November 25th, A. D. 1872.

D. S. WADE, *Judge.*

On the 6th day of December, A. D. 1872, the defendants filed herein their notice of appeal; which is in words and figures following, to wit:

THE TERRITORY OF MONTANA,
Lewis & Clarke County:

3rd judicial district court.

ABRAHAM SANDS & JULIUS SANDS, PLAINTIFFS,
vs.
EDGAR G. MACLAY, CHAS. A. BROAD-
12 water, George Steele, & Mathew Carroll, defendants.

To the said plaintiffs and the clerk of said court:

You are hereby notified that the defendants in the above entitled action hereby appeal to the supreme court of the Territory of Montana from the judgment therein made and entered in the said district court on the 25th day of November, A. D. 1872, in favor of the said plaintiffs and against the said defendants, for two thousand seven hundred and four dollars and sixty-one cents damages and $26.20 their costs of suit, and from the whole thereof.

W. F. SANDERS,
Atty. for Defts.

To the clerk of said district court and the said plaintiffs, and Chumasero & Chadwick, their attorneys.

Received copy Dec. 6th, 1872.

CHUMASERO & CHADWICK,
Plffs.' Attys.

On the 6th day of December, A. D. 1872, the defendants filed their undertaking on appeal herein; which said undertaking is in the words and figures following, to wit:

THE TERRITORY OF MONTANA,
County of Lewis & Clarke:

3 judicial dist. court.

13 ABRAHAM SANDS & JULIUS SANDS, plaintiffs,
vs.
EDGAR G. MACLAY, CHARLES A. BROADWATER, Mathew Carroll, & George Steele, defendants.

Undertaking on appeal.

Whereas the defendants in the above-entitled action have appealed to the supreme court of the Territory of Montana, from a judgment entered against them in the said action on the twenty-fifth day of November, A. D. 1872, for two thousand seven hundred and four dollars and sixty-one cents damages and twenty-six dollars and twenty cents costs of suit, and from the whole and every part of said judgment:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, Samuel T. Hauser and John T. Murphy, residents and householders of Lewis & Clarke County, in the Territory of Montana, do hereby jointly and severally undertake and promise on the part of the appellants that the said appellants will pay all damages and costs
14 which may be awarded against them on the appeal not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally bound.

And whereas the appellants are desirous of staying the execution of the said judgment so appealed from, we do therefore, in consideration thereof and of the premises, jointly and severally undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of five thousand six hundred dollars, (being double the amount named in the judgment,) that if the said judgment appealed from or any part thereof be affirmed, the appellant shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the appellants upon the appeal.

S. T. HAUSER.
JOHN T. MURPHY.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

S. T. Hauser and John T. Murphy, the persons named in and who subscribed the foregoing undertaking as sureties thereto, being severally

duly sworn, each for himself says that he is worth the amount
15 specified in said undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

S. T. HAUSER.
JOHN T. MURPHY.

Subscribed & sworn to before me this 6th day of Dec., 1872.
[SEAL.] FRED. KENNETT,
Notary Public.

TERRITORY OF MONTANA,
County of Lewis & Clarke, ss:

I, J. P. Wade, clerk of the district court, third judicial district, in and for the county and Territory aforesaid, do hereby certify that the foregoing twenty pages, numbered from one to twenty, inclusive, contain a full, true, and correct transcript of certain pleadings, records, and proceedings filed, made, and had in said court in the case of Abraham Sands et al. vs. Edgar G. Maclay et al.

Witness my hand and the seal of said court this 31st day of December, A. D. 1872.

[SEAL OF DIST. COURT.] H. P. WADE, *Clerk.*
ALEX. H. BEATTIE,
Deputy Clerk.

Filed Jany. 6th, 1873. I. R. Alden, clk. sup. court.

16 In the supreme court Territory of Montana. Jany. term, A. D. 1873.

ABRAHAM SANDS & JULIUS SANDS, PLAINTIFFS,
vs.
EDGAR G. MACLAY, C. A. BROADWATER, George Steele, & Mathew Carroll, defts. & appellants.

Appeal from third judicial district court, Lewis & Clarke County, Montana Territory.

Now, at this day, to wit, the sixth day of January, anno Domini one thousand eight hundred and seventy-three, come the defendants and appellants, Edgar G. Maclay, C. A. Broadwater, George Steele, and Matthew Carroll, by their attorney of record, W. F. Sanders, esqr., and file herein in said court a transcript of the record of the proceedings had and done in the above-entitled action in the district court of the third judicial district, sitting in and for the county of Lewis & Clarke, in said Territory.

And afterwards, to wit, on the ninth day of January, 1873, this cause coming on to be heard on motion by appellants to continue the
17 hearing herein until the next term of this court, on consideration whereof it is ordered by the court here that the said motion be sustained, and the hearing in said cause be continued to the August term, A. D. 1873, of this court.

And afterwards, to wit, on the fifteenth day of August, A. D. 1873, this cause came on to be heard upon the said transcript of the record,

and was duly argued by counsel for the respective parties and submitted, whereupon the court took the same under advisement.

And afterwards, to wit, on the 13th day of January, A. D. 1874, (that being one of the term days of the January term, A. D. 1874, of said court,) this cause coming on before said supreme court for decision and judgment on appeal, the court delivered its opinion herein in writing; of which in words and figures the following is a copy, to wit:

ABRAHAM SANDS ET AL., RESPONDENTS,
vs.
EDGAR G. MACLAY ET AL., APPELLANTS.

In supreme court.

Opinion of the court, by Knowles, J.

The most important question presented in this action is the
18 right of a defendant to deny the allegations of the complaint upon information and belief.

The practice act of this Territory, approved December 23, 1867, in section 46 provided that the answer of the defendant should contain: "First, if the complaint be verified, a specific denial to each allegation in the complaint controverted by the defendant, or a denial thereof according to his information and belief." Under the provision of the statute undoubtedly the defendant could deny upon information and belief. This section of the code, however, was amended in 1872, and it was provided "that the answer of the defendant should contain a specific denial to each allegation in the complaint intended to be controverted by the defendant." Another mode of presenting an issue was also provided for that was not in the former practice act, namely: "In denying any allegation in the complaint, not presumptively within the knowledge of the defendant, it shall be sufficient, to put such allegation in issue, for the defendant to state, as to any such allegation, he has not and cannot obtain sufficient knowledge or information upon which to base a
19 belief." In this amended code it will be observed that the clause allowing a denial upon information and belief was left out. We must presume that this was done intentionally. Can the term "specific denial" be made to signify both a positive or absolute denial and a denial upon information and belief? It is certain that the legislative assembly of 1867 did not consider that it could. If they had so understood that term, it is not reasonable to suppose that they would have provided for both a specific denial and a denial upon information and belief. If they had held that the term "specific denial" embraced both an absolute denial and a denial upon information and belief, then the clause they put into the statute, "a denial according to information and belief," was useless—mere verbiage. The more reasonable view is that they used the term "specific denial" as contradistinguished from a general denial and a denial upon information and belief. Considering this the proper construction, and the conclusion is inevitable that by leaving out the clause "a denial according to information and belief,"
20 by the legislative assembly of 1872, they intended to abolish that mode of denial. However, if other courts had not come to the conclusion that a statute amended as ours has been, excluded a denial upon information and belief, I should hesitate long before coming to such a determination.

In 1851 the New York code had a provision in relation to denials in an answer, similar to our practice act of 1867.

That provided that a defendant might make a general or specific denial of each material allegation of the complaint controverted by defendant, or denial according to knowledge, information, or belief.

In 1852 the New York legislature amended this statute so that it read as follows:

"A general or specific denial of each material allegation of the complaint controverted by the defendant." It will be seen by this amendment left out the clause, "a denial according to knowledge, information, or belief."

In the case of Thorn and Maynard ag. The New York Central
21 Mills, (10 Howard's Practice Rep., 19,) upon this subject Justice Bacon says, "I regard the construction put upon this section (149) by Judge Daly, in Hacket vs. Prichard, (11 Leg. Abs., 315,) as the true exposition of the clause in question. The clause allowing a denial according to a defendant's knowledge, information, or belief has been stricken out, and I suppose the construction of the amended section now is that the defendant must deny absolutely, without any qualification whatever, unless he can deny that he has either knowledge or information sufficient to form a belief. When he cannot do this, as when he has knowledge or information and has formed a belief, he must deny absolutely, for he cannot traverse the allegation now, except in one of two modes. The intention of the legislature appears to have been to allow the defendant less latitude in traversing a complaint than before, for they have designedly omitted the provision allowing a denial upon information, knowledge, or belief."

In the case of Blake vs. Eldred, 18 How. Prac. Rep., 240, Justice James uses this language:

22 "But I inclined to think this second denial a sham. It answers on information and belief, and then denies all the allegations of the complaint inconsistent with the facts alleged and stated in the answer. Code, sec. 149, requires the defendant to deny the material allegations of the complaint absolutely, or if any knowledge or information sufficient to form a belief. Answering on information and belief is not denying on information and belief, and if it were it would not aid the pleading, because such a denial is not authorized by the code."

To the same point see Hackett vs. Richards, 3 E. D. Smith, 13; Therasson vs. McSpeddon, 2 Hill, 1; Whittaker's Practice, 2 vol., 80. In the case of Edwards vs. Lent & Lent, 8 How. Prac. Rep., 28, is an authority apparently in conflict with those above. On an examination of the date of the rendition of the opinion, I am inclined to think it must have been given before the amendment to the New York code in 1852. The opinion was delivered in 1852, the same year of the amendment, and no reference is made to it.

23 The fact that the verification prescribed in the code provides that the affidavit shall state "that the facts stated in the pleading are true to the knowledge of the person making it, except as to those matters which are therein stated on *on* information and belief, and as to those matters that he believes it to be true," is urged by the appellants with considerable force, they claiming that was contemplated. It is apparent, from the verification prescribed, that every pleading in a case might have allegations upon information and belief. The answer to this is that the verification prescribed by the New York code contains this provision, and yet the courts in that State have rendered the decisions above referred to. The courts of that State did not consider the provisions in the section upon verification sufficient to override the positive requirements of the form of a denial prescribed by sec. 149 of

their code, and I do not think it sufficient to override the requirements of our code.

It is probable that the construction I have given to sec. 56 of our practice act works a considerable hardship upon the defendants
24 in this case, and may work a hardship in many other cases unless the section should be amended by our legislative assembly. I must, however, construe the law as I find it, and in accordance with what I conceive legal principles. The hardship of such a law is a consideration for the legislative assembly and not the courts. There is one other denial of the defendants to be considered, namely: "And the said defendants have not and cannot obtain sufficient information upon which to base a belief as to whether said goods, or any thereof, are or were lost to the plaintiffs, and therefore deny the same."

Taking all of the facts into consideration presented in the record, and the court may have well considered this denial as sham. The plaintiffs allege that the goods were delivered to the defendants as common carriers. The defendants should know whether or not they delivered said goods to the plaintiff. The only thing that is set forth that would in any way excuse them from not having this knowledge is the statement in the verification that the business was transacted by
25 agents. Still the court below may have held that they ought to know enough of the conduct of their agents to have some belief or information as to their doings, and that parties could not shut their ears and refuse to receive information upon a subject of such interest to them and the person who intrusted them with his property. The question of whether a party has presumptive knowledge of a fact stated in his pleadings must, in some measure, be left to the judgment of the court below. Considering that I have held that the other allegations of the complaint were not properly put in issue, I cannot see any error in the court below in holding that if all the other allegations in the complaint were admitted, that the defendants must have presumptively had knowledge as to whether the plaintiff had lost any of the goods specified. It is contended that if all of these denials were sham, that still the plaintiff had no right to judgment without first striking out the answer. In effect that is the plaintiff's motion. The first ground for the motion is that the amended answer filed herein is sham and irrele-
26 vant." In New York the practice of moving for a judgment on a sham or immaterial answer has been sustained, and this court has held that a party might move to strike out an answer that raised no issue, and then for judgment, or for judgment notwithstanding the on the ground that it raised no material issue, (Lamme vs. Kintzing, 295.) The courts of California have held that when an answer raised no material issue, it would be considered that the complaint was admitted. A defendant cannot present an issue in any other manner than prescribed by the code. Hence a denial in an answer that does not conform to the requirements of the code raises no issue. Suppose that the form of raising an issue prescribed in the code, of alleging that the defendant has not and cannot obtain information sufficient to form a belief, was stricken out, could it be contended that an issue could still be presented in that manner? I think not. The point that the record does not show that the court below took proof upon the amount for which he rendered judgment is now for the first time raised by the dissenting opinion herein. All presumptions are in favor of the pro-
27 ceedings of the court below, and this court will not consider errors of this character, concerning which the defendants took no exception in the court below, and for which no error is assigned in the

record presented to this court or pointed out in the briefs and arguments of counsel.

For these reasons the order of this court is that the judgment of the court below be affirmed with costs.

D. S. WADE, *Chief Justice.*
HIRAM KNOWLES, *Asso. Justice.*

Filed & entered Jan'y 13th, 1874. I. R. Alden, clerk.

On the same day a dissenting opinion was delivered herein in writing & filed, of which, in words and figures, the following is a copy, to wit:

Montana supreme court.

ABRAHAM SANDS ET AL.
vs.
EDGAR G. MACLAY ET ALS.

Dissenting opinion.

By SERVIS, *J.*, dissenting:

I cannot concur in the opinion just announced. My reasons
28 therefor are, that in my judgment it misconceives the true office of an answer under our code. It applies rules and principles which had their origin under other codes entirely dissimilar from ours, and which have been so often altered, amended, and repealed as to be of little authority and less aid in the construction of our statute now under consideration. And it also misconceives the authority of the court to render judgment as by default pending an answer duly on file and undisposed of by motion or demurrer.

It is undoubtedly true that the strictness of common-law rules of pleading would condemn the answer in question upon demurrer. But our code, like all others, has abolished the former rules of pleadings, and established in their stead others essentially different; it has defined our pleadings to be the formal allegations of the parties, and it has defined the rule by which their sufficiency is determined; which is that of their liberal construction with a view to substantial justice, and this should be the polar star, strictly observed, in construing all codes of civil practice. It is said that section 56, under which this answer
29 is drawn, does not expressly provide that it shall or may be drawn upon information and belief; while this is true, it is also true that it does not expressly or by implication prohibit an answer being so drawn, and when we turn to section 63 we find very strong implication in favor of such an answer; in fact, the form therein provided for an affidavit of verification to an answer expressly provides, "That when the matters are stated in an answer upon information and belief," *that* then the affidavit shall so state. But it is said that this applies solely to that second mode provided for in section 56, whereby not to deny but to form an issue, viz: In denying any allegation in the complaint not presumptively within the knowledge of the defendant, it shall be sufficient, to put such allegation in issue, for him to state that he has not and cannot obtain sufficient knowledge or information upon which to base a belief."

I maintain that this does not annihilate that strong presumption favoring a denial upon information, as derived from section 63 of our code. In fact, the very provision there made for the verification of

30 an answer is utterly inapplicable to an answer other than one of personal knowledge, or belief, or information. Would it not be quite inconsistent for a defendant to say, by his answer, that he has no information and no belief as to the subject-matter of a complaint, and then add thereto an affidavit swearing that he believes the same to be true; that is, that he believes the same to be true—that of which he has no knowledge, no information, no belief, and no means of obtaining the same.

Counsel are mistaken in the correct rendition of our statute when they say, in their brief, that, "In denying an allegation, not presumptively within the knowledge of the defendant, he may deny on information and belief, if he has not and cannot obtain sufficient information upon which to base a belief." Our statute does not so read. It provides that, in such case, such statement shall be sufficient to put the allegations of the complaint in issue; not that such statement shall so change the English language as to state a denial without denying anything. It simply means that such statement shall operate and have the

31 same effect in forming an issue as an absolute denial would have. But it is said that even then this mode will not avail the defendant of a defense, because it is charged against him, by motion, that the matters charged against him are presumptively within his knowledge, although he swears to the contrary. This, however, can only apply to one of the denials in the answer, which does not affect the error of which I complain, and I care not further to discuss this branch of the case, other than to remark that if ever a defendant should be in so unfortunate a condition as to have no belief or unbelief about the subject-matter of his lawsuit, then his presumptive knowledge might, possibly, be tested, tried, and determined by the court, referee, or jury. It is insisted that a proper construction of the language used in the answer under consideration makes the pleader attempt to set up the facts of his information and belief as a defense to the action. This, I think, is straining construction beyond liberality. For it seems to me quite apparent, and that, too, without much liberality, that it is not his belief, but the facts

32 believed to exist, upon which he relies for his defense. And it is further urged that the defendant has not specifically denied the allegations he seeks to controvert; not that he has not specifically pointed out and stated wherein and what he controverts, but that he has so done upon information and belief, and, therefore, it is not a specific denial. I maintain, that all that is required under our code in order to specifically controvert the allegations of a complaint is for the answer to point out, state, and define wherein he so controverts the same, and then, on oath, aver his belief in the truth thereof; and that is all that is meant by the phrase "specifically deny." And this the defendant has done. He has stated what he denies, how, and *and* the means that enabled him so to deny, and swears he believes it to be true. How else, I ask, do men usually obtain their general knowledge but upon informa tion? When are they at liberty to impart that information? And the answer is, when they honestly believe it, even to the retailing of slander, when not with evil intent. I therefore insist that the

33 holding of the court in this case establishes, to say the least, a seeming inconsistent proposition of law, and a doctrine, as I think, unsupported by authority. It establishes the practice, that if a defendant has not personal knowledge of the matters he seeks to controvert by his answer, although he may have full information thereof which he believes to be true; yet, nevertheless, he must be turned out

of court, unless he will consent to the commission of downright perjury, by swearing that he has not, and cannot, obtain information sufficient to base a belief upon; or, in other words, if he has a belief, he cannot answer unless he will swear that he has not a belief. Such holding, such construction of our statute is not, in my judgment, liberal, with a view to substantial justice. In many cases it would defeat the end of justice. It is wrong in principle, bad in tendency. It superinduces perjury, turns out of the temple of justice suitors whose convictions of honesty, truth, and right would not allow them, by resort to perjury, for
34 worldly gain, or the maintenance of right, to endanger their liberty here, or their happiness hereafter. Not only for the reasons given above do I dissent from my brothers, but as well for the reason that I cannot see upon what authority the court below gave judgment for the plaintiff without disposing of the answer by demurrer or motion, and without proof of the plaintiff's claim for damages.

Under the New York code (and perhaps that of California) it is expressly provided that, in such case, judgment may be rendered upon notice given to the opposite party; but even then, if it is upon a complaint other than for the unconditional payment of money, an inquiry as to damages must be had. But no such provision is found in our statute. Judgment by default can only be rendered as provided in sections 30 and 53 of our practice-act.

Sham and irrelevant answers must be disposed of by motion or demurrer, as provided in section 60 of that act, and no judgment can be rendered as upon default in any case under our civil practice
35 when an answer is pending, until such answer is disposed of as provided by statute. The court cannot, in such case, resolve itself into a common-law or chancery court and proceed to render judgment pro confesso.

But my brothers say that the motion for the judgment in this case "operated in effect as a motion to strike out, strike off, or, in other words, to dispose of the answer, for the reason that it was sham or irrelevant." Concede this to be true, although a novel name and novel mode of procedure to dispose of a pleading under our statute, and how does it leave the case? It leaves a complaint for the recovery of damages upon default, upon which, as shown by the record, the court, without proof, proceeded to and did render judgment for the exact amount claimed in the complaint; and they say that in New York the practice of moving for judgment on a sham answer has been sustained. This undoubtedly is true; but the New York code, as well as that of California, so provides. But now there the code requires that an examination must be had and proof made as to the allegations of the
36 complaint when not for the unconditional payment of money; and they refer to the case of Lomme vs. Kintzing, (1st Montana Reports, p. 295,) as authority, where the court say: "Under our practice where an answer raises no material issue, the plaintiff may either move that it be stricken out as sham and irrelevant or move for judgment."

The court, when rendering this decision, must have had before them either the New York or California code, whereby it is expressly provided, in those exact words, that such proceeding may be had, whereas our statute makes no provision for moving for judgment. And yet this is all the court then say in answer to the able argument of counsel in support of the proposition that no judgment could be rendered upon the pleadings without proof. I cannot think the court so intended. If

it did I cannot but think it bad law, and that its reversal will be hailed by the profession as one of much-needed reformation.

But is said for this no error is assigned, and therefore the
37 court is not bound to search for error not assigned. It must be remembered that this case is here upon appeal, by which the whole case was removed to this court, with the whole record before us; and the affirmance of the judgment below is virtually and to all intents and purposes the judgment of this court, and we are bound to take notice of any error appearing upon the record, most especially when it is so apparent.

I had prepared a more lengthy discussion of this case, but being reminded by that commanding authority cited by counsel, "many words they darken speech," I substituted this, with the hope that those who may think me in error, will not only take the trouble to examine the question in connection with the opinion of the court, the legislation of the various States and Territories, and the authorities cities by counsel, but to appeal to the legislative tribunal for relief against this seeming unjust discrimination between those who may and those who may not care for or fear the dangerous crime of perjury.

F. G. SERVIS,
Asso. Justice.

38 And thereupon the following judgment on appeal was entered of record, to wit:

Whereas, lately in the district court of the third judicial district of said Territory, sitting in and for the county of Lewis & Clarke, in a cause between Abraham Sands and Julius Sands, respondents, and Edgar G. Maclay, C. A. Broadwater, George Steele, and Matthew Carroll, appellants, wherein the judgment of the said district court in favor of the said respondents and against the said appellants herein was rendered and entered on the 25th day of November, 1872, in the following words and figures, to wit:

"In third judicial district court, Lewis and Clarke County, Montana Territory.

"ABRAHAM SANDS & JULIUS SANDS, "*vs.* "EDGAR G. MACLAY, C. A. BROADWATER, Mathew Carroll, & George Steele.	October term, 1872.

"This cause came on for hearing on the 25th day of November, A. D. 1872, on the plaintiff's motion for judgment on the complaint, and
39 the answer of defendants, and was heard before the court, whereupon the same was submitted to the court for consideration and decision, and after due deliberation thereon the court delivered its decision that the answer of defendants was insufficient, and that the same presented no issue to be tried, and that the denials therein contained were defective and evasive, and insufficient, and ordered judgment to be entered upon the said complaint and answer in favor of the plaintiffs, and against the defendants, for the sum of two thousand seven hundred and four dollars and sixty-one cents, besides costs.

"Wherefore, by reason of the law and decision aforesaid, it is ordered and adjudged that the said plaintiffs do have and recover of and from the said defendants the sum of two thousand seven hundred and four dollars and sixty-one cents, with interest thereon at the rate of ten per

cent. per annum from the date hereof until paid, together with the said plaintiff's said costs and disbursements incurred in this action, amounting to the sum of twenty-six & $\frac{20}{100}$ dollars.

40 "D. S. WADE, *Judge.*

"Judgment rendered November 25th, A. D. 1872," as by the inspection of the record or transcript thereof, of the said district court, which was brought into this court by virtue of an appeal, agreeably to the statute of said Territory of Montana, in such case made and provided, fully and at large appears.

And whereas in the present term of January, in the year of our Lord one thousand eight hundred and seventy-four, this cause came on for decision and judgment before this court on the said transcript of record, (the errors assigned on the said appeal having been argued and submitted by counsel at the August term, A. D. 1873, of this court:)

On consideration whereof, it is now ordered and adjudged by this court, that the judgment of the court below, before recited herein, be and the same is hereby affirmed, with costs to be taxed against the appellants, and it is hereby ordered that the said respondents, Abraham Sands and Julius Sands, recover of and from the said appellants,

41 Edgar G. Maclay, C. A. Broadwater, George Steele, and Mathew Carroll, their costs in this behalf expended, taxed at $, and have execution therefor,

JANY. 13th, 1874.

And on the same day the said appellants gave notice of appeal to the Supreme Court of the United States from the said judgment of the supreme court of Montana Territory.

And afterwards, to wit, on the twentieth day of January, A. D. 1874, the said appellants filed their undertaking on appeal of which, in words and figures, the following is a copy, to wit:

Supreme Court of the United States.

EDGAR G. MACLAY, CHARLES A. BROADWATER, Mathew Carroll, & George Steele, plffs. in error,
vs.
ABRAHAM SANDS, & JULIUS SANDS, DEFTS. IN error.

Know all men by these presents, that we, Samuel Neel and

42 W. C. Gillette, as sureties for Edgar G. Maclay, Charles A. Broadwater, Mathew Carroll, and George Steele, are held and firmly bound unto Abraham Sands and Julius Sands in the just and full sum of six thousand dollars, (6,000.00,) lawful money of the United States to be paid to the said Abraham Sands and Julius Sands, their executors or administrators, for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, administrators, and assigns by these presents, sealed with our seals, and dated this fifteenth day of January, A. D. 1874.

The condition of the above obligation is such that, whereas the above named Edgar G. Maclay, Chas. A. Broadwater, Mathew Carroll, and George Steele have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered by the supreme court of the Territory of Montana in the above action, wherein the above-named Edgar G. Maclay, Charles A. Broadwater, Mathew Car-

roll, and George Steele are plaintiffs in error, and the said Abraham Sands and Julius Sands are defendants in error.

43 Now, therefore, the condition of the above obligation is such that if the said Edgar G. Maclay, Chas. A. Broadwater, Mathew Carroll, and George Steele shall prosecute their said writ of error to effect, and if they shall fail to make good their said plea, shall answer all damages and costs, and pay the said judgment rendered against them, with interest and costs, then the said obligation to be void; otherwise the same shall be and remain in full force and virtue.

SAMUEL NEEL. [SEAL.]
W. C. GILLETTE. [SEAL.]

This bond having been presented to us this 20th day of January, A. D. 1874, as a security for the costs and damages upon the writ of error sued hereout, and to operate as a supersedeas, and we considering the same sufficient, do hereby approve the same for the uses and purposes aforesaid.

R. S. WADE, *Chief-Justice.*
F. G. SERVIS, *Associate Justice.*

Filed January 20th, 1874. I. R. Aldin, clerk. Sup. court, Montana.

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the Territory of Montana, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between Abraham Sands and Julius Sands, and Edgar G. Maclay, C. A. Broadwater, George Steele, and Matthew Carroll, a manifest error hath happened, to the great damage of the said Edgar G. Maclay, C. A. Broadwater, George Steele, and Mathew Carroll, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court

45 of the United States, together with this writ, so that you may have the same at Washington on the second Monday (that being the twelfth day) of October, 1874, next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Nathan Clifford, senior associate justice and Acting Chief-Justice of the Supreme Court of the United States, the twentieth day of January, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] I. R. ALDEN,
Clerk of the Supreme Court of the Territory of Montana.

(Indorsed:) Supreme Court of the United States. Abraham Sands & Julius Sands, defts. in error, vs. Edgar G. Maclay, C. A. Broadwater, George Steele, & Mathew Carroll, plffs. in error. Writ of error. Filed January 20th, 1874. I. R. Alden, clerk.

46 UNITED STATES OF AMERICA, *ss:*

To Abraham Sands and Julius Sands, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday (that being the twelfth day) of October, A. D. 1874, next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein Edgar G. Maclay, C. A. Broadwater, George Steele, and Mathew Carroll are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness Honorable Nathan Clifford, senior associate and acting chief justice of the Supreme Court of the United States, this twentieth
47 day of January, in the year of our Lord one thousand eight hundred and seventy-four.

D. S. WADE,
Chief Justice.
F. G. SERVIS,
Associate Justice.

HELENA, M. T., *Jany. 22nd*, 1874.

Service of a copy of the within citation acknowledged.
CHUMASERO & CHADWICK,
Attys. for Sands Bro., & Defts. in Error.

(Indorsed:) Supreme court, Territory of Montana. Abraham Sands & Julius Sands, defts. in error, vs. Edgar G. Maclay, C. A. Broadwater, George Steele, & Mathew Carroll, plffs. in error. Citation. Filed Jany. 20th, 1874. I. R. Alden, clk.

48 In the supreme court, Territory of Montana.

ABRAHAM SANDS & JULIUS SANDS
vs.
EDGAR G. MACLAY, CHAS. A. BROADWATER, George Steele, & Mathew Carroll.

I, I. R. Alden, clerk of the supreme court of the Territory of Montana, do hereby certify the foregoing to be a full, true, and correct copy of the proceeding had and done in the above-entitled action as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand at Virginia City, in said Territory, on this twelfth day of February, A. D. 1874.

[SEAL.] I. R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 204. Edgar G. Maclay, Charles A. Broadwater, George Steel, and Mathew Carroll, plaintiffs in error, vs. Abraham Sands & Julius Sands. Montana Ter'y sup. court. Filed 21st October, 1874.

REC. 204—2

roll, and George Steele are plaintiffs in error, and the said Abraham Sands and Julius Sands are defendants in error.

43 Now, therefore, the condition of the above obligation is such that if the said Edgar G. Maclay, Chas. A. Broadwater, Mathew Carroll, and George Steele shall prosecute their said writ of error to effect, and if they shall fail to make good their said plea, shall answer all damages and costs, and pay the said judgment rendered against them, with interest and costs, then the said obligation to be void; otherwise the same shall be and remain in full force and virtue.

SAMUEL NEEL. [SEAL.]
W. C. GILLETTE. [SEAL.]

This bond having been presented to us this 20th day of January, A. D. 1874, as a security for the costs and damages upon the writ of error sued hereout, and to operate as a supersedeas, and we considering the same sufficient, do hereby approve the same for the uses and purposes aforesaid.

R. S. WADE, *Chief-Justice.*
F. G. SERVIS, *Associate Justice.*

Filed January 20th, 1874. I. R. Aldin, clerk. Sup. court, Montana.

44 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the Territory of Montana, greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court before you, between Abraham Sands and Julius Sands, and Edgar G. Maclay, C. A. Broadwater, George Steele, and Matthew Carroll, a manifest error hath happened, to the great damage of the said Edgar G. Maclay, C. A. Broadwater, George Steele, and Mathew Carroll, as by their complaint appears: We being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment therein be given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court

45 of the United States, together with this writ, so that you may have the same at Washington on the second Monday (that being the twelfth day) of October, 1874, next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Nathan Clifford, senior associate justice and Acting Chief-Justice of the Supreme Court of the United States, the twentieth day of January, in the year of our Lord one thousand eight hundred and seventy-four.

[SEAL.] I. R. ALDEN,
Clerk of the Supreme Court of the Territory of Montana.

(Indorsed:) Supreme Court of the United States. Abraham Sands & Julius Sands, defts. in error, vs. Edgar G. Maclay, C. A. Broadwater, George Steele, & Mathew Carroll, plffs. in error. Writ of error. Filed January 20th, 1874. I. R. Alden, clerk.

46 UNITED STATES OF AMERICA, *ss:*

To Abraham Sands and Julius Sands, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday (that being the twelfth day) of October, A. D. 1874, next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein Edgar G. Maclay, C. A. Broadwater, George Steele, and Mathew Carroll are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness Honorable Nathan Clifford, senior associate and acting chief justice of the Supreme Court of the United States, this twentieth
47 day of January, in the year of our Lord one thousand eight hundred and seventy-four.

D. S. WADE,
Chief Justice.
F. G. SERVIS,
Associate Justice.

HELENA, M. T., *Jany. 22nd*, 1874.

Service of a copy of the within citation acknowledged.
CHUMASERO & CHADWICK,
Attys. for Sands Bro., & Defts. in Error.

(Indorsed:) Supreme court, Territory of Montana. Abraham Sands & Julius Sands, defts. in error, vs. Edgar G. Maclay, C. A. Broadwater, George Steele, & Mathew Carroll, plffs. in error. Citation. Filed Jany. 20th, 1874. I. R. Alden, clk.

48 In the supreme court, Territory of Montana.

ABRAHAM SANDS & JULIUS SANDS
vs.
EDGAR G. MACLAY, CHAS. A. BROADWATER, George Steele, & Mathew Carroll.

I, I. R. Alden, clerk of the supreme court of the Territory of Montana, do hereby certify the foregoing to be a full, true, and correct copy of the proceeding had and done in the above-entitled action as the same appears of record and on file in my office.

In testimony whereof I have hereunto set my hand at Virginia City, in said Territory, on this twelfth day of February, A. D. 1874.

[SEAL.] I. R. ALDEN, *Clerk.*

(Indorsement on cover:) No. 204. Edgar G. Maclay, Charles A. Broadwater, George Steel, and Mathew Carroll, plaintiffs in error, vs. Abraham Sands & Julius Sands. Montana Ter'y sup. court. Filed 21st October, 1874.

REC. 204—2

IN THE

Supreme Court of the United States.

Brief of Plaintiffs in Error,

No. 204.

EDGAR G. MACLAY, CHARLES F. BROADWATER, GEORGE STEELL and MATHEW CARROLL,
Plaintiffs in Error,

vs.

ABRAHAM SANDS and JULIUS SANDS.

W. F. SAUNDERS,
L. M. SAUNDERS,
Attorneys for Plaintiffs in Error.

WASHINGTON, D. C.:
R. BERESFORD, PRINTER, 523 SEVENTH ST., N. W.
1877.

Supreme Court of the United States.

BRIEF OF PLAINTIFFS IN ERROR, No. 204.

EDGAR G. MACLAY, CHARLES F. BROADWATER, GEORGE STEELL and MATHEW CARROLL, *Plaintiffs in Error*,
vs.
ABRAHAM SANDS and JULIUS SANDS.

STATEMENT OF CASE.

The error complained of in this cause is that the courts below treated the amended answer, filed herein, (Page 3 of the *Record*,) as sham and irrelevant, and held that it raised no issue putting the defendants in error to proof of their claim. The action was one intort, in which the defendants in error alleged the negligence and misbehavior of the plaintiffs in error in and about their duty as common carriers in the transportation of an invoice of goods from Corinne, in Utah, to Helena, in Montana Territory. It was an action sounding in damages. The plaintiffs in error, at the time mentioned in the complaint of the defendants in error, (Page 1 of the *Record*,) were the owners of a number of large trains, moved by oxen and mules, respectively; and with them were carriers of goods from Corinne, on the Central Pacific Railroad of California, to the various camps, forts, military posts, Indian agencies and towns in the Territory of Montana; and among these places was the town of Helena. In this way they forwarded a large tonnage of goods. There were other parties

on a much smaller scale also engaged in the same business. In addition to the foregoing business of carriers, the plaintiffs, having large warehouses at Corinne, were also engaged in the business of forwarders, acting as carriers when their own transportation was not otherwise engaged, and as forwarders when it was so engaged, and advertising to act in each of these capacities.

The following provisions of the Civil Practice Act were in force at the time of the verification of this answer:

SEC. 56. The answer of the defendant shall contain a specific denial to each allegation in the complaint intended to be controverted by the defendant, and may contain a statement of any matter in avoidance or a counter claim constituting a defence, or the subject matter of cross complaint which may entitle the defendant to relief against the plaintiff alone, or against a defandant, or co-defendants. In denying any allegation in the complaint, not presumptively within the knowledge of the defendant, it shall be sufficient to put such allegation in issue for the defendant to state that, as to any such allegation, he has not and cannot obtain sufficient knowledge or information upon which to base a belief.

SEC. 60. When the answer contains new matter, constituting a defence, or a counter claim, or cross complaint, the plaintiff shall, within ten days, (said days to be computed from the time of the service on the plaintiff of a copy of such answer,) reply or demur to the same for insufficiency, stating in his demurrer the grounds thereof; and he may also, within the same time, demur to one or more defences set up in the answer; sham and irrelevant answers and defenses, and so much of any answer as may be irrelevant, redundant, and immaterial, may be stricken out on motion, and upon such terms as the court in its discretion may impose.

SEC. 61. Every pleading shall be subscribed by the party, or his attorney, and shall be verified by oath, except as provided in section sixty-three (of this act.)

SEC. 63. All complaints, answers and replications shall be

verified as provided in this section, except that when an admission of the truth of the allegation might subject the party to a prosecution for felony, or misdemeanor, or when the action is by the district attorney, in behalf of the territory or county, the verification may be omitted. The affidavit of verification shall state, that the facts stated in the pleading are true to the knowledge of the person making it, except as to those matters which are therein stated on his information and belief, and as to those matters, that he believes it to be true. Such verification shall be made by the party, or if there are several parties united in interest or pleadings, by one at least of such parties acquainted with the facts, if such party is in the county and capable of making the affidavit. The verification may also be made by the agent or attorney of the party, if the party is absent from the county where the attorney resides, or is from any other cause unable to verify the pleading, and in such case the verification shall state that the affiant is the agent or attorney of the party, and the reason why such verification is made by such agent or attorney, and that the facts stated in the pleading are true to the best knowledge, information and belief of such agent or attorney.

Revised Statutes of Montana, 1871–2, pp. 38–40, sec. 65. "If irrelevant or redundant matter be inserted in a pleading, it may be stricken out by the court on motion of any party aggrieved thereby." *Do.* 40.

The case is here upon the judgment roll. From the record (page 1) in the case it appears that, on or about the 5th day of August, 1872, the plaintiffs in error received at Corrinne an invoice of goods, belonging to the defendants in error. (*Record*, page 2.) It is alleged in the complaint, that they received these goods in their capacity of common carriers, and if this is true, then the measure of their liability and the degree of their diligence is fixed by the law defining the diligence and liability of that class of bailees. It is denied in the amended answer that they received these goods in that capacity, and the

defendants under that denial sought to have their diligence measured, and their liability determined by the law applicable to forwarders, expecting to show if it did finally appear that the goods were really lost, that they had faithfully fulfilled every demand of the law upon them with reference to these goods in the capacity of forwarders, which was the extent of their identification with them.

The gist of the action was negligence. Because of that negligence the defendants in error claimed to recover damages, which they allege amounted to $2,704.61. The negligence was denied, the damage was denied, and both the negligence and damage were to be proved antecedent to recovery.

But the denials to which the defendants, or one of them, were compelled to make on oath, were made upon the information and belief of the defendants, with a single exception. That exception is the denial of the vital allegation, that the goods were in any event, or for any cause lost to the defendants in error. It has not heretofore been controverted, and it will not here be controverted, that if the denials were good in form there was error in the cause, for which it should be reversed. The plaintiffs in error claim that there was error, whether the denials were good or no.

ARGUMENT.

1st. In actions like this, sounding in damages for negligence, a failure to deny the damages alleged, does not admit them, and the defendants in error should have proved their damages before recovering judgment therefor. The authorities upon this point are numerous, and are based on the soundest reasons. (See 5 *Hill*, p. 290, *New York Dry Dock Co.* vs. *McIntosh; Loeb et al.* vs. *Kamak et al.*, 1st Montana Reports, p. 152; *Connors* vs. *Meir*, 2 E. D. Smith's R., 314; *McKensie* vs. *Farrell*, 4 Bosworth R., p. 202; *Gray* vs. *Dye*, 39 Iowa R., p. 366.)

The intimation by the majority of the judges of the

Supreme Court, that for all that appeared, there might have been proof introduced is hardly true in the face of the order, (See record, p. 5,) where the court wholly granted a motion for judgment and entered the same as the consequence of holding the answer for naught.

2d. It was error to hold invalid the denial of the loss by defendants in error of any of the goods mentioned in the complaint based upon a lack of information and inability to obtain information. This will be conceded unless it can be maintained that the fact whether the goods were lost or not was " presumptively within the knowledge " of the plaintiffs in error.

Such facts are not put in issue by an assertion that they " have not and cannot obtain sufficient knowledge or information upon which to base a belief." Whether upon a claim by the opposite party that a fact so sought to be denied *is* presumptively within his knowledge, and that, therefore his denial in that form is sham, such party is entitled to a hearing by affidavits or proof in other ways, or whether the court of its own view is to determine the question, we need not enquire. If the court is thus to judge, the position calls for the exercise of that wide liberality which courts uniformly exercise when judging of the frivolity of a dilatory plea to determine whether a party should be permitted to answer to the merits of the action. In thus exercising its discretion the court could not assume as a fact in the case that the goods in question were received by the plaintiffs in error as common carriers, for that was denied. The fact that the plaintiffs in error were carriers as to other goods does not preclude them from acting as forwarders of goods, and as they had denied that in or about these goods, they were common carriers, if it were shown by them that they were forwarders as to these goods, could it be said that the fact whether the goods were lost or no, was presumptively within their knowledge ? Can it be maintained that a party who acts as a mere transfer agent or forwarder of goods is charged with personal knowledge of the goods during the

subsequent transportation of them to their destination when it must be conceded that the duty of the forwarder, as to the goods, terminated with their transfer and shipment?

It appeared from the affidavit of verification to the amended answer by Edgar G. Maclay, one of the plaintiffs in error, that the business of the plaintiffs in error where the goods were received and shipped was performed by agents, and that no one of the plaintiffs in error then within the county where the complaint was verified was cognizant of the facts in the amended answer set forth on information and belief derived from the agents of the parties.

In the face of the denial that in or about these goods the plaintiffs in error were common carriers, and notwithstanding it appeared that this business was transacted by agents of the plaintiffs in error and not by the principals themselves, the court, if it comprehended its decision decided that facts which the parties could not personally know were presumptively within their knowledge. The conditions of the country and its topography the court below took, and this court will take judicial notice of, without formal proof. From Corinne to Helena is a highway, over which there is much travel, upon which but little labor has been performed. It crosses streams which flow into the Salt Lake basin and the head waters of the Columbia and Missouri rivers. It crosses three considerable ranges of mountains, for by far the greater part of the way the country is uninhabited. Serious accidents to transportation frequently occasion great delay. High water in the streams and snows upon the mountain ranges occasion frequent and long continued delays to trains. The ordinary time consumed over this road with laden teams is from thirty to fifty days, but trains have been one hundred and sixty days in making the journey. The distance between the two points is four hundred and fifty miles. With the expiration of the time which the defendants in error had prescribed as sufficient for the arrival of their goods they promptly brought this action, and the plaintiffs

in error were called upon to answer, while they yet expected the arrival of the goods at Helena.

The plaintiffs in error could not say that the delay was not some evidence of the loss of the goods; the frequency with which trains so long delayed nevertheless reached their destination, was evidence that the goods might yet arrive, especially as this was a small invoice of goods, and would probably be only a part of a much larger load which might require detours to other points before reaching Helena, and being called upon to answer before the country could be searched, and before they felt any certainty of the loss of the goods, they said, what they were conscientiously compelled to say, that they had not and could not then obtain sufficient knowledge on which to base a belief as to whether the goods from any cause were lost to the defendants in error or no. It seems to us a clear deduction from the situation, that the court could not say that the plaintiffs in error were as to these goods common carriers, nor that the fact as to whether the goods were lost was presumptively within the knowledge of the plaintiffs in error, and if this one fact was in issue they were entitled to a jury, and to require proof before judgment against them.

3d. But what precedes brings us to the main question in this cause, which is this: Is a denial of a specific fact vitiated by a statement that such denial is based upon the information and belief of the party? It cannot be denied that a party may allege or deny under the civil practice act of Montana on his information and belief. The utmost sanction which that code requires to a fact alleged or denied, is that the party alleging or denying has information of and belief in what he pleads.

No one claims that a more solemn assertion than one based on information and belief is required.

If this is true, where in the paper which he files shall the extent of that sanction appear? The court below says in the affidavit: They say further, that if that proper fact rightly to appear somewhere appears in the right place,

and again appears in the wrong place, its second appearance renders the whole pleading sham and irrelevent.

If the theory of pleading adopted by the Supreme Court of Montana were the correct theory, then a court reading a complaint or answer would know that its several allegations were made upon the personal knowledge or the information or belief of parties verifying the same. The allegations would, with the verification, import no more than this, but their import would be sufficient. (See Sierra Nevada Mining Company *vs.* Lesee, 10 Neva. R., 353.) Does it destroy the efficiency of a pleading that it expressly states what is inevitably implied? Again: If these denials had in the body of the amended answer been stated to have been made on personal knowledge of the facts, would such statement here vitiate them? As certainly it would as the statement that they are made on information and belief. It will not be possible to maintain that a denial is faulty which refers the court to the information and belief of the party as his sanction for making it without, at the same time proving that a denial is faulty, which refers to the personal knowledge of the party as his sanction for making it, where the right is as complete to make it under one sanction as the other.

Information and belief justify a denial, personal knowledge justifies a denial, and how designating the particular justification for making a given denial impairs the efficiency of that denial, it is difficult by any process of reasoning to discover.

If a party makes a specific denial, that is all that is required. If, boastfully, the party precedes his specific denial with a statement that he makes it of his personal knowledge of the facts, or if, apologetically, he precedes it with a statement that it is made on his information and belief, it is difficult to perceive how, by the boast or the apology, it is rendered less a denial, its efficiency destroyed, or its character, as a particular denial, impaired or vitiated. A denial cannot be said to be less specific, that is particular, because it only, as a matter of conscience, puts into exercise the infor-

mation and belief of the party. If it covers the allegation, not only in form, but also in substance, if it is not pregnant with an admission that the allegation is substantially true, it is a specific denial.

The point actually in issue is as to the sufficiency of the form of the denial, but the court below abandoned that point and branched off into a discussion as to the extent of the defendants' knowledge on which the denial was made, and it found in the investigation of this side issue that that knowledge was ample to justify the party in making the denial, and having so found the sufficiency of the information, the court recurs to the actual proposition involved, and with that sufficient knowledge of the party, overturns the form and character of the denial. The court has thereby acceeding to a fallacy of confusion.

This question does not seem to be a question of pleading so much as it does a question of casuistry. It is an effort, thus far successful, to interpret the statute in such a manner as to burden the conscience of a party verifying a pleading with a heavier load than it can bear and maintain its integrity. Unless the decisions to which we have referred, the court are wholly faulty, the language employed in the case of *Thorn* and *Maynard* vs. *The New York Central Mills*, 10 *Howard's Practice Report*, p. 19, and quoted in the opinion delivered in this case, as the opinion of the majority of the court, cannot be read without a shudder.

For to swear absolutely to what one only knows on information and belief is perjury, and the situation of the party verifying an answer is well illustrated in the dissenting opinion of Mr. Associate Justice Servis.

This and much more might be said upon the hypothesis that it was not proper to insert in the body of the complaint a designation of the particular denials which were made on the information and belief of the party. But we claim that such designation is required.

A habit has grown up in the west, which widely obtains in the territory of Montana, to make every allegation of a

complaint and every denial and allegation of an answer or reply, whether made upon positive knowledge or information and belief, absolute in form, and to attach thereto the verification prescribed by Section 63 of the civil practice act, and to interpret the verification as meaning that what is not sworn to as from personal knowledge is sworn to on the information and belief of the party verifying the same, leaving, however, what is affirmed on personal knowledge and what is affirmed on information and belief, wholly undistinguishable.

This vicious interpretation and practice finds devotees and a refuge, if not a justification, in the decisions of courts. Not only that, but it is proposed by the decision in this cause to blot out the correct interpretation and to forbid its application in the future. This feature of pleading is borrowed from the practice in Courts of Chancery. In those courts the bill and the answer were evidence. It became important, therefore, to know what sanctions were attached to the several allegations.

An allegation made on information and belief, denied by one made on personal knowledge, was held to be disproved in the absence of other proof. It was, therefore, the universal practice, if a person knew a material fact to plead it in the absolute form, to designate that he knew such fact to be true, and, if from his information, which was not competent proof, he beleived a material fact to exist, to plead it on information and belief.

The Legislative Assembly of Montana thinking that practice to be a good one sought to introduce it into the jurisprudence of that Territory, and finding in the statutes of the State of California what seemed to it fitting words to be used as the vehicle of that introduction, borrowed the formula of the verification from that State. The proper interpretation of that verification, and the duty of the pleader in that connection as to the form of his allegations in the body of the pleading had been settled by the Supreme Court of that State long prior to the adoption by Montana of the

statute in question. (See *Patterson* vs. *Ely*, 19 California Reports, pp. 28 to 41.)

In the phrase "information *or* belief" of the California statute the Legislative Assembly of Montana substituted the conjunctive for the disjunctive conjunction, but this in no manner changed the meaning of the verification, and the intelligible interpretation in the case last above cited is an authority to the courts of Montana.

Where statutes are adopted from other States, the highest courts of which have interpreted them, courts hold that it was the design of the Legislature to adopt such interpretation.

It would not seem, however, to be necessary to appeal to such a rule to interpret this statute. Where Legislatures have not required a party to swear to more than his belief a much shorter formula of a verification has been adopted. (See The Ohio Stat., Vol. 1, Nash Pleading and Practice, p. 272.)

A proper interpretation of that verification is, that what is alleged or denied without qualification and in form absolute is sworn to be on the personal knowledge of the party swearing to the pleading, and if such party has not that personal knowledge but has information upon which he does base a belief, he shall precede or follow his allegation or denial in the body of the pleading with the statement that it is made on such information and belief, thereby enabling the court to distinguish those allegations or denials made on information and belief from those which are made on the personal knowledge of the party verifying the same from an inspection of the pleading.

Mr. Justice Knowles, in delivering the opinion of the majority of the court below, does not seem to render to the interpretation given this statute the tribute of his approval. He says that he should hesitate long before arriving at that conclusion if other courts had not reached a similar decision. Those other courts were inferior courts in other jurisdictions, and should have been regarded as precedents to be approved

if right, rather than authorities to be followed where wrong. And it certainly seems that the majority of the Justices in court below surrender their position absolutely when they say, (*Record*, p. 9), "It is apparent from the verification prescribed that every pleading in a case *might* have allegations upon information and belief." If this "apparent" fact is true, why should a denial on information and belief be held invalid? Because, say the majority, the pleading states what we would imply. All that is meant by denying specifically, as contradistinguished from a general denial, is that the particular allegations of the pleading shall be severally and successively denied in substance and form. A specific denial is a particular denial of a single allegation, and when each controverted allegation has been particularly designated and denied, then the allegations may be said to have been specifically denied. The general denial is a denial of each allegation in mass rather than in detail.

(See Moak's Van Sanborn's Pleading, Vol. I, p. 546; marginal paging 449.)

Nor is this rendered less an error by attempting to visit its responsibilily upon the Legislative Assembly.

The interpretation given to the statute needs reversal. The statute itself has maintained an existence in other jurisdictions as well as Montana, and if the doubts of the majority of the justices of the Supreme Court of Montana had grown into such convictions as are expressed by Mr. Justice Servis in his dissenting opinion, the statute would be all that could be desired, and these plaintiffs in error, with a good defence, could be permitted te make in in court, without paying as the price thereof the moral guilt or the legal responsibility of perjury. We respectfully submit, that the conclusion sought to be derived from the change in the statute, is a conclusion which that change does not indicate.

An effort is made by the justices rendering the opinion of the majority in the court below, to show what the Legislative Assembly designed by the change made in the law by

the Legislative Assembly of 1872. Too much cannot be predicated of changes of words, and it will not be just to attribute too much nicety and precision of thought to the Legislature in its selection of words.

Certainly, if we finesse as to the design of the Legislative Assembly over its use of words in merely changing laws, we should attribute to them the same precision in the use of words elsewhere.

If this rule is to be asserted for one purpose, it is to be asserted for all. And then we shall say that a "general denial," as well as a "specific denial," may be on personal knowledge or on information and belief.

The criticism of Mr. Associate Justice Servis upon this answer as a common law plea, seems inapplicable. Where, as under that system fictions were resorted to and no verifications required, the cases are not parallel, and no comparison of value could be instituted.

Mr. Justice Servis, however, seems to express the better law of this case, when he says;

"Our code, like all others, has abolished the former rules of pleadings, and established in their stead others essentially different; it has defined our pleadings to be the formal allegations of the parties, and it has defined the rule by which their sufficiency is determined; which is that of their liberal construction with a view of substantial justice, and this should be the polar star, strictly observed, in construing all codes of civil practice. It is said that section 56, under which this answer is drawn, does not expressly provide that it shall or may be drawn upon information and belief; while this is true, it is also true that it does not expressly or by implication prohibit an answer being so drawn, and when we turn to section 63 we find very strong implication in favor of such an answer; in fact, the form therein provided for an affidavit of verification to an answer expressly provides, 'That when the matters are stated in an answer upon information and belief,' *that* then the affidavit shall so state. But it is said that this applies solely to that second mode

provided for in section 56, whereby not to deny but to form an issue, viz: In denying any allegation in the complaint not presumptively within the knowledge of the defendant, it shall be sufficient, to put such allegation in issue, for him to state that he has not and cannot obtain sufficient knowledge or information upon which to base a belief.

"I maintain that this does not annihilate that strong presumption favoring a denial upon information, as derived from section 63 of our code. In fact, the very provision there made for the verification of an answer is utterly inapplicable to an answer other than one of personal knowledge, or belief, or information. Would it not be quite inconsistent for a defendant to say, by his answer, that he has no information and no belief as to the subject-matter of a complaint, and then add thereto an affidavit swearing that he believes the same to be true; that is, that he believes the same to be true—that of which he has no knowledge, no information, no belief, and no means of obtaining the same.

"Counsel are mistaken in the correct rendition of our statute when they say, in their brief, that, 'In denying an allegation, not presumptively within the knowledge of the defendant, he may deny on information and belief, if he has not and cannot obtain sufficient information upon which to base a belief.' Our statute does not so read. It provides that, in such case, such statement shall be sufficient to put the allegations of the complaint in issue; not that such statement shall so change the English language as to state a denial without denying anything. It simply means that such statement shall operate and have the same effect in forming an issue as an absolute denial would have. But it is said that even then this mode will not avail the defendant of a defense, because it is charged against him, by motion, that the matters charged against him are presumptively within his knowledge, although he swears to the contrary. This, however, can only apply to one of the denials in the answer, which does not affect the error of which I complain, and I care not further to discuss this branch of the case,

other than to remark that if ever a defendant should be in so unfortunate a condition as to have no belief or unbelief about the subject-matter of this lawsuit, then his presumptive knowledge might, possibly, be tested, tried, and determined by the court, referee, or jury. It is insisted that a proper construction of the language used in the answer under consideration makes the pleader attempt to set up the facts of his information and belief as a defense to the action. This, I think, is straining construction beyond liberality. For it seems to me quite apparent, and that, too, without much liberality, that it is not his belief, but the facts believed to exist, upon which he relies for his defense. And it is further urged that the defendant has not specifically denied the allegations he seeks to controvert; not that he has not specifically pointed out and stated wherein and what he controverts, but that he has so done upon information and belief, and, therefore, it is not a specific denial. I maintain, that all that is required under our code in order to specifically controvert the allegations of a complaint is for the answer to point out, state, and define wherein he so controverts the same, and then, on oath, aver his belief in the truth thereof; and that is all that is meant by the phrase 'specifically deny.' And this the defendant has done. He has stated what he denies, how, and *and* the means that enabled him so to deny, and swears he believes it to be true. How else, I ask, do men usually obtain their general knowledge but upon information? When are they at liberty to impart that information? And the answer is, when they honestly believe it, even to the retailing of slander, when not with evil intent. I therefore insist that the holding of the court in this case establishes, to say the least, a seeming inconsistent proposition of law, and a doctrine, as I think, unsupported by authority. It establishes the practice, that if a defendant has not personal knowledge of the matters he seeks to controvert by his answer, although he may have full information thereof which he believes to be true; yet, nevertheless, he must be turned out of court, unless he will consent to the

commission of downright perjury, by swearing that he has not, and cannot, obtain information sufficient to base a belief upon; or, in other words, if he has a belief, he cannot answer unless he will swear that he has not a belief. Such holding, such construction of our statute is not, in my judgment, liberal, with a view to substantial justice. In many cases it would defeat the end of justice. It is wrong in principle, bad in tendency. It superinduces perjury, turns out of the temple of justice suitors whose convictions of honesty, truth, and right would not allow them, by resort to perjury, for worldly gain, or the maintenance of right, to endanger their liberty here, or their happiness hereafter. Not only for the reasons given above do I dissent from my brothers, but as well for the reason that I cannot see upon what authority the court below gave judgment for the plaintiff without disposing of the answer by demurrer or motion, and without proof of the plaintiff's claim for damages.

"Under the New York code (and perhaps that of California) it is expressly provided that, in such case, judgment may be rendered upon notice given to the opposite party; but even then, if it is upon a complaint other than for the unconditional payment of money, an inquiry as to damages must be had. But no such provisions is found in our statute. Judgment by default can only be rendered as provided in sections 30 and 53 of our practice act.

"Sham and irrelevant answers must be deposed of by motion or demurrer, as provided in section 60 of that act, and no judgment can be rendered as upon default in any case under our civil practice when an answer is pending, until such answer is disposed of as provided by statute. The court cannot, in such case, resolve itself in a common law or chancery court and proceed to render judgment pro confesso.

"But my brothers say that the motion for the judgment in this case 'operated in effect as a motion to strike out, strike off, or, in other words, to dispose of the answer, for the reason that it was sham or irrelevant.' Concede this to

be true, although a novel name and novel mode of procedure to dispose of a pleading under our statute, and how does it leave the case? It leaves a complaint for recovery of damages upon default, upon which as shown by the record, the court, without proof, proceeded to and did render judgment for the exact amount claimed in the complaint, and they say in New York the practice of moving for judgment on a sham answer has been sustained. This undoubtedly is true; but the New York code, as well as that of California, so provides. But now there the code requires that an examination must be had and proof made as to the allegations of the complaint when not for the unconditional payment of money; and they refer to the case of Lomme *vs.* Kintzing, 1st Montana Reports, p. 295, as authority, where the court say: 'Under our practice where an answer raises no material issue, the plaintiff may either move that it be stricken out as sham and irrelevant or move for judgment.'

"The court, when rendering this decision, must have had before them either the New York or California code, whereby it is expressly provided, in those exact words, that such proceeding may be had, whereas our statute makes no provision for moving for judgment. And yet this is all the court then say in answer to the able argument of counsel in support of the proposition that no judgment could be rendered upon the pleadings without proof. I cannot think the court so intended. If it did I cannot but think it bad law, and that its reversal will be hailed by the profession as one of much needed reformation.

"But it is said for this no error is assigned, and therefore the court is not bound to search for error not assigned. It must be remembered that this case is here upon appeal, by which the whole case was removed to this court, with the whole record before us; and the affirmance of the judgment below is virtually and to all intents and purposes the judgment of this court, and we are bound to take notice of any error appearing upon the record, most especially when it is so apparent."

The following is the provision of the code of California upon the subject of the form of denials in an answer:

"SEC. 437. The answer of the defendant shall contain:

"1st. A general denial or specific denial of the material allegations of the complaint controverted by the defendant.

"2d. A statement of any new matter constituting a defense or counter claim. If the complaint be verified, the denial of each allegation controverted must be specific, and be made positively, or according to the information and belief of the defendant. If the defendant has no information or belief upon the subject sufficient to enable him to answer an allegation of the complaint, he may so state in his answer, and place his denial on that ground. If the complaint be not verified, a general denial is sufficient, but only puts in issue the material allegations of the complaint." (See California Practice act.)

It is apparent from this that the use of the English language in the State of California is one thing and in the Territory of Montana is quite another, or the Supreme Court of that Territory has made a mistake. The Legislative Assembly of California and the lexicographers have reversed the ordinary meaning of words or there is error in the judgment of the Supreme Court of that Territory.

The decision of the case of Butler vs. Clafflin *et al.*, decided at the October term, 1876, of this court, is an authority that for such an error as this the case should be reversed. The defendants have been deprived of a trial by a jury of an issue of fact in a case at common law, and this, too, after they were entitled to it as well by the laws of Montana Territory. (See Sec. 190 of Civil Practice Act of Montana, p. 64, Statutes of 1871-2 of Montana.)

This court does not sit to administer laws, the proper interpretation of which is the reserved right of a State, and the rule that the court accepts the interpretation of the highest court of a State of its statutes affecting its practice does not apply. There are, as between the United States and a Territory, no rights reserved to the latter.

Nor is this a mere question of practice. It is more, and affects the substantial rights of these defendants.

They may be heard by the laws of Montana, and by the common law, upon their defense appropriately set forth in their defense to this claim.

That right has been denied them by an error of the court below, and to correct it their case is here for the judgment of the Supreme Court.

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L. M. SAUNDERS,
Attorneys for Plaintiff's in error.

Supreme Court of the United States.

No. 204.

EDGAR G. MACLAY AND OTHERS,
PLAINTIFFS IN ERROR,

vs.

ABRAHAM SANDS AND JULIUS SANDS.

In Error to the Supreme Court of the Territory of Montana.

R. T. MERRICK,
M. F. MORRIS,
Of Counsel for Defendants in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 204.

EDGAR G. MACLAY AND OTHERS,
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vs.

ABRAHAM SANDS AND JULIUS SANDS.

In Error to the Supreme Court of the Territory of Montana.

BRIEF ON BEHALF OF DEFENDANTS IN ERROR.

Abraham and Julius Sands, traders at Helena, Montana, sued the defendants, Edgar G. Maclay and others, as common carriers of the loss of certain goods intrusted to them at Corinne, Utah, to be thence transported to Helena, and alleged to have been lost through the negligence of the carriers. The defendants, "upon their information and belief," denied the allegations of the complaint. And upon this answer, the plaintiffs moved for and obtained judgment for the amount of their claim, on the ground that the answer was insufficient under the Code of Practice of Montana, and that it raised no issue and constituted no defense. This decision of the lower court was approved by the supreme court of the Territory.

Two points arise in the case: 1st. Was the answer of the defendants insufficient under the law? 2d. Presuming the answer to have been insufficient, was the court justified in

entering judgment for the plaintiffs without proof or other proceeding.

I.

To check the laxity of legal proceedings resulting from the abolition or relaxation of the system of special pleading constituted by the old common law lawyers, but deemed too narrow and too artificial for the present age, the legislative power has found it expedient in many of our States and Territories to require that pleas or answers amounting to the general issue should be fortified with a more or less specific statement of defense under oath; and the propriety of such requirements, even when grounded, not upon a legislative enactment, but upon a mere rule of court, has been sustained by a recent decision of this Court in the case of Smoot *vs.* Rittenhouse, October term, 1875.

The Code of Practice of the Territory of Montana, sec. 46, approved December 23, 1867, provided that the answer of the defendant should contain, "if the complaint be verified, a specific denial to each allegation in the complaint controverted by the defendant, or a denial thereof according to his information and belief." This was amended in 1872 so as to read, "that the answer of the defendant should contain a specific denial to each allegation in the complaint intended to be controverted by the defendant." And the amended act of 1872, further provided, that, "in "denying any allegation in the complaint, not presumptively "within the knowledge of the defendant, it shall be suffi- "cient to put such allegation in issue, for the defendant to "state, as to any such allegation, he has not and cannot "obtain sufficient knowledge or information upon which to "base a belief."

It is evident that, under the act of 1867, the denial in the present case would unquestionably have been deemed sufficient. But, in amending that act, the Territorial Legislature omitted the clause allowing a denial "according to informa-

tion and belief," and, in its place, apparently provided for an issue under a statement for an insufficiency of knowledge or information whereon to base a belief. The omission was evidently intentional, and it must be presumed that the purpose of the Legislature was thereby to limit the latitude of denial allowed under the former law. Whether such legislative action was or was not expedient, is not a question for judicial determination. That the Legislature had the right so to prescribe, will scarcely be controverted. The only open question is, was such the scope and operation of the enactments referred to?

The act of 1867 uses the expression, "*specific denial*," in opposition to "a denial under information and belief." It is to be presumed that the expression retains the same meaning in the act of 1872; so that to all allegations of facts "presumptively within the knowledge" of the defendants, these last must return a specific and positive denial. And to allegations of facts, "not presumptively within their knowledge," it is enough for them to say that "they have not and cannot obtain any sufficient knowledge or information upon which to base a belief." Wherever the answer does not conform to these requirements, the courts are justified in disregarding it, as they would, on demurrer, a plainly insufficient or irrelevant plea under the common law.

New York had, prior to 1852, an act entirely similar to the Montana act of 1867. In 1852, the Legislature of that State amended it by an amendment precisely of the character of the Montana amendment of 1872; and the following language was held upon the subject in the Supreme Court of the State of New York:

"The clause allowing a denial according to a defendant's "knowledge, information, or belief, has been stricken out; "and I suppose the construction of the amended section "now is, that the defendant must deny absolutely, without "any qualification whatever, unless he can deny that he

"has either knowledge or information sufficient to form a "belief. When he cannot do this, as when he has knowl- "edge or information and has formed a belief, he must deny "absolutely, for he cannot traverse the allegation now, ex- "cept in one of two modes. The intention of the legisla- "ture appears to have been to allow the defendant less "latitude in traversing a complaint than before, for they "have designedly omitted the provision allowing a denial "upon information, knowledge, or belief."

Thorn *vs.* N.Y. Central Mills, 10 Howard's Pract. 19, and other cases cited in Opinion in Record, p. 9.

II.

If the answer was insufficient according to law, it was no legal answer at all; and the proper course of the plaintiffs was that which they pursued—to move for judgment as in the case of default. This is the course adopted, not only in Montana, but under similar codes of practice or rules of court elsewhere, as in New York, California, and the District of Columbia. See—

Lomme *vs.* Kintzing, 1 Montana, 295.
De Forest *vs.* Baker, 1 Abbot's Prac. Rep., 34.
Montana Practice Act, sec. 186.
Smoot *vs.* Rittenhouse, Oct. Term, 1875.

The motion for judgment requested an assessment of damages. There is nothing in the record to show whether the lower court took any proofs or not preparatory to making such assessment. The point does not seem to have been made either in the lower court or in the supreme court of the Territory; and it first appears in the dissenting opinion in the latter tribunal. This is a case where the presumption will apply in favor of the regularity of the proceedings of the lower court, in the absence both of proof and allegation of irregularity. But, in fact, no proof was required at all in the case. The Practice Act of Montana, section 186,

(Laws of Montana, p. 63,) provides as follows: "Judgment "may be had, if the defendant fail to answer the complaint, "as follows: First. In an action arising upon contract for "the recovery of money or damages only, if no answer has "been filed with the clerk of the court within the time "specified in the summons, or such future time as may have "been granted, the clerk, upon the application of the plain- "tiff, shall enter the default of the defendant, and imme- "diately thereafter enter judgment for the amount specified "in the summons, including the costs, against the defendant. " * * * * * Second. In other actions, if no answer "has been filed with the clerk within the time * * * * "the clerk shall enter the default of the defendant; and "thereafter the plaintiff may apply at the first or any sub- "sequent term of the court for the relief demanded in the "complaint. If the taking of an account, or the proof of "any fact be necessary to enable the court to give judgment, "or to carry the judgment into effect, the court may take "the account, or hear the proof; or may, at its discretion, "order a reference for that purpose; and when the action "is for the recovery of damages in whole or in part, the "court may order the damages to be assessed by a jury; "or if to determine the amount of damages, a long account "be necessary, by reference, as above provided." * * *

In Montana, the distinction between law and equity is abolished, as far as it is possible to abolish them. Hence it is plain, from the foregoing provision of the law of the Territory, that, in suits like the present to recover the value of articles of merchandise alleged to have been lost, and to which there is appended a full and complete schedule of items, with a specific statement of values, there is no necessity for proof in aid of a judgment by default.

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